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No. _____

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IN THE

Supreme Court of the United States

October Term, 1984

STATE OF NEW MEXICO,
Petitioner,

v.

DONALD T. REGAN, Secretary of the Treasury of the UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether the jurisdiction of the district courts to entertain mandamus actions, expressly granted by 28 U.S.C. § 1361, and to review decisions of federal officers, expressly granted by 28 U.S.C. § 1331, under the provision of 5 U.S.C. § 702, is divested simply because the case involves a duty to distribute funds in the custody of the officer?

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STATE OF NEW MEXICO,
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v.

DONALD T. REGAN, Secretary of the Treasury of the UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioner, State of New Mexico, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on October 9, 1984.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 745 F.2d 1318 (10th Cir. 1984), appears in Appendix A. The unreported Memorandum Opinion and Order of the District Court for the District of New Mexico appears in Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on October 9, 1984. This petition for certiorari was filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are 5 U.S.C. § 702, 28 U.S.C. §§ 1331, 1346(a)(2), 1361, 1491(a) and 2201, which appear in Appendix C.

STATEMENT OF THE CASE

The State of New Mexico filed this action to compel the Secretary of the Treasury to deliver to the State 50% of the rents and royalties obtained from leasing public lands in New Mexico. The Mineral Leasing Act requires distribution of this money to the State:

> All money received from sales, bonuses, royalties . . . and rentals of the public lands . . . shall be paid into the Treasury of the United States; 50 per centum thereof shall be paid by the Secretary of the Treasury to the State . . . within the boundaries of which the leased lands or deposits are or were located . . . .

30 U.S.C. § 191. The Secretary of the Treasury had begun reducing the State's 50% share of rents and royalties after passage of the Crude Oil Windfall Profits Tax Act of 1980, Pub.L. No. 96-223, 94 Stat. 230 (current version at 26 U.S.C. §§ 4986-4998), by imposing on the State share a portion of the tax owed by the United States under the Windfall Profits Tax Act.

The State promptly filed suit in 1981, invoking the jurisdiction of the district court under 28 U.S.C. §§ 1331 and 1361. The State sought declaratory judgment as to the duty of the Secretary to distribute rents and royalties under the Mineral Leasing Act, an accounting to establish the amount that should have been distributed to New Mexico, and mandamus to compel the distribution of the amount in the Secretary's custody wrongfully withheld from New Mexico by the Secretary.

The district court entered a declaratory judgment that New Mexico was entitled to one-half the royalties, granted an accounting, and ordered the Secretary to pay New Mexico 50% of the rentals and royalties received, undiminished by the Windfall Profits Tax. The court declared that in the future the State's share should not be reduced by the Windfall Profits Tax. The district court found that it had subject matter jurisdiction because the action was for declaratory and mandatory relief to compel the Secretary of the Treasury to perform his duty of distributing rents and royalties as commanded by the Mineral Leasing Act, and held that a claim for money was only incidentally involved.

The Tenth Circuit Court of Appeals, without reaching the merits, found that exclusive jurisdiction over the case rested with the Claims Court. The Tenth Circuit held that the suit was primarily for damages and any equitable relief was incidental. The case was ordered transferred to the Claims Court pursuant to 28 U.S.C. § 1631.

REASONS FOR GRANTING THE WRIT

This case involves fundamental issues of the jurisdiction of the district courts to hear actions for mandamus against federal officers, and to review decisions of federal officers. Despite express grants of jurisdiction in 28 U.S.C. §§ 1331 and 1361, the Tenth Circuit determined that this action for declaratory judgment, accounting and mandamus could not be maintained in district court because the case was designed to reach money which the government held.[1] The Tenth Circuit decided, after three years of litigation, that the case should begin again in the Claims Court. Few issues are more important for this Court than the clarification of those jurisdictional questions which unnecessarily consume the time, effort and limited resources of the lower courts and litigants. Fundamental to this Court's role to assure efficient operation of the federal courts is resolution of questions about the appropriate federal court in which the states may seek review of the decisions of federal officers and agencies. Only the Supreme Court can resolve such problems.

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[1] This case involves substantial sums of money to the State of New Mexico, other western states whose royalty shares are also being computed unlawfully and the United States. While the amounts involved at the time this suit was filed were not large, the Secretary's ongoing practice in computing state royalty shares continually increases the amount involved in this case. Because of the Secretary's unlawful action, the State of New Mexico lost $1,627,500 in the six month period from April 1, 1980 through September 30, 1980. State's Complaint at 4. Figures from the Mineral Management Service for the Department of the Interior show that the State of New Mexico lost approximately 8.9 million dollars in 1982 because of the method used for computing the State's share of rents and royalties. Letters from Vernon B. Ingraham, Chief Royalty Accounting Branch, to Mike Warner, State of New Mexico, Department of Finance and Administration (Nov. 8, 1982, Dec. 22, 1982, Feb. 7, 1983, May 2, 1983).

1. This Case Raises Significant and Recurring Issues Concerning the Jurisdiction of the Claims Court and the District Courts Which Require Resolution by the Supreme Court in Its Supervisory Role Over the Lower Courts to Ensure the Speedy and Efficient Conduct of Litigation.

This case presents a common example of the confusion that arises in cases to review agency action where the relief sought is essentially equitable but the consequence is a distribution of money from the federal government. In these non-statutory review cases, the confusion is two-fold: whether the cases should proceed in district court or Claims Court or whether the cases should be bifurcated and proceed in both.

In this case, the complaint in district court alleged that the State of New Mexico had suffered legal wrong because of agency action and that the Secretary of the Treasury had a duty to the State of New Mexico which was not being performed. The complaint clearly stated a claim within 5 U.S.C. § 702 of the Administrative Procedures Act, and the mandamus statute, 28 U.S.C. § 1361. The State sought equitable relief to compel the Secretary to perform his mandatory duty to distribute money wrongfully withheld from the State. The State further sought a declaration that the Secretary should act in accordance with law as to funds he would receive in the future.

The money benefit for New Mexico was almost entirely prospective as of June 9, 1981, the filing date of this action, because the Windfall Profits Tax Act was enacted in 1980. The monetary relief sought involved rents and royalties improperly withheld from the effective date of the Windfall Profits Tax Act, March 1, 1980. The equitable relief sought by the State involved rents and royalties unlawfully withheld from June 9, 1981 through the life of the Windfall Profits Tax Act.

The United States, by way of defense, recharacterized this action, which was clearly framed as one for equitable relief, as

one for damages and argued that exclusive jurisdiction over such claims rested in the Claims Court. Brief for Appellant at 36, 745 F.2d 1318 (10th Cir. 1984). The United States, recognizing that the Claims Court could not afford complete relief, suggested that the State should sue for money in the Claims Court and then seek the necessary equitable relief in federal district court. *Id.* at 36-37.

The district court saw the action as one for equitable relief and granted New Mexico all of the relief sought. The Tenth Circuit saw the same case as primarily for damages. The Tenth Circuit therefore declined to reach the merits and ordered the case transferred to the Claims Court to begin again.

Neither court had the benefit of any direction from the Supreme Court in deciding the issue. The ensuing confusion is wasteful of the resources of the courts and the litigants. Furthermore, it is not clear, under the present state of the law, that after another three years in the Claims Court, this case will not be transferred back to the district court.

Although neither the district court nor the Tenth Circuit chose to bifurcate, there is also confusion about whether the case should have been bifurcated if the portion seeking monetary relief can be brought only in the Claims Court. The Tenth Circuit concluded that the equitable relief was incidental to the monetary relief sought and therefore could be addressed in the Claims Court under 28 U.S.C. § 1491(a)(3). 745 F.2d at 1322. Section 1491(a)(3), however, applies only to actions based on contract. Furthermore, the Claims Court has no power to enter a declaratory judgment in this case, *United States v. King*, 395 U.S. 1 (1969); *Cape Fox Corp. v. United States*, 646 F.2d 399, 402 (9th Cir. 1981), and the declaratory judgment issue must be decided by the Tenth Circuit if it is to be decided at all. It thus appears the equitable claims should have been retained in the Tenth Circuit.

In *Minnesota v. Heckler*, 718 F.2d 852, 855–60 (8th Cir. 1983), the Eighth Circuit held it was appropriate to bifurcate the damage claims in the Claims Court from the declaratory and injunctive claims in district court. The *Minnesota* court stated bifurcation would be unavoidable, in a case like this one, where the Claims Court lacked the necessary equitable jurisdiction. *Id.* at 859. *See Rowe v. United States*, 633 F.2d 799, 801–802 (9th Cir. 1980), *cert. denied*, 451 U.S. 970 (1981). Bifurcation is, however, an issue over which the circuits are badly split. *See, e.g., Minnesota v. Heckler*, 718 F.2d at 858 n.11. The issue is especially important here because the Claims Court cannot provide complete relief. In this situation, the district court should have jurisdiction over at least the non-monetary portion of the claim and more rationally over the entire claim so that complete relief may be granted in a single action.

Watt v. Alaska, 451 U.S. 259 (1981), demonstrates the State's predicament. *Watt* came to this Court by way of federal district court rather than the Claims Court. In *Watt*, the State of Alaska sued the federal government in a case similar to this one, asking the court to determine the correct distribution of money to be paid to the State under the Mineral Leasing Act. Although the jurisdictional issues were not addressed in *Watt*, the State of New Mexico reasonably relied on the correctness of the procedure that had been followed in *Watt*.

The fundamental issues of jurisdiction in this case are thus worthy of the Court's time. This Court has acknowledged the importance of clarifying the jurisdiction of federal district courts by granting certiorari in such cases. *E.g., Bruner v. United States*, 343 U.S. 112 (1952). Clarification of these issues will ensure the availability of clear, speedy and adequate remedies and will thus facilitate the administration of justice.

2. The Lower Court Erred on an Important Question of Federal Jurisdiction When It Decided District Courts Lack Jurisdiction to Review Decisions of Federal Officers and to Entertain Mandamus Actions Which Involve a Duty to Distribute Funds.

The State of New Mexico had invoked the jurisdiction of the district court under 28 U.S.C. § 1361 because the State sought to compel the Secretary to perform his mandatory duty under the Mineral Leasing Act to distribute 50% of the rents and royalties to the State. Jurisdiction was also appropriate under 28 U.S.C. § 1331 to provide the relief available under the Administrative Procedures Act, 5 U.S.C. § 702, because the State sought review of Secretarial actions in violation of federal law. The Tenth Circuit erred when it held the district court lacked jurisdiction to hear New Mexico's case.

District courts in other circumstances have properly exercised jurisdiction under 28 U.S.C. § 1361 to compel federal officers and employees to perform duties involving paying out substantial sums. *E.g., Vishnevsky v. United States,* 581 F.2d 1249, 1253–56 (7th Cir. 1978) (district court has Section 1361 jurisdiction to order that employee be given credit for overpayment of taxes, citing cases where mandamus was held appropriate vehicle to compel federal officers to pay); *Frost v. Weinberger,* 515 F.2d 57, 62 (2nd Cir. 1975), *cert. denied sub nom., Frost v. Mathews,* 424 U.S. 958 (1976) (district court has Section 1361 jurisdiction over claim for restoration of Social Security benefits); *State of Minnesota v. Weinberger,* 359 F.Supp. 789, 791 (D.Minn. 1973) (district court has Section 1361 jurisdiction to hear claim to recover over $41,000,000 under the Social Security Act); *People ex rel. Bakalis v. Weinberger,* 368 F.Supp. 721, 724 (N.D. Ill. 1973) (district court has Section 1361 jurisdiction over actions by several states to compel federal officers to allocate funds appropriated by Congress).

The Tenth Circuit's decision, if allowed to stand, will force litigants to resort to the Claims Court in mandamus actions whenever the duty involved is a duty to pay money, thereby imposing a great burden on claimants and on the docket of the Claims Court. The Tenth Circuit has, in effect, turned the clock back on mandamus to the situation that existed before the 1962 enactment of 28 U.S.C. § 1361. Section 1361 granted jurisdiction to the district courts over any action in the nature of mandamus. Before 1962 a person living far from the District of Columbia, seeking to compel a federal officer whose official residence was in that District to perform a duty, was required to bring a mandamus action in the District Court for that District. The exclusive jurisdiction for that court was found "to tailor our judicial processes to the convenience of the Government rather than to provide readily available, inexpensive, judicial remedies for the citizen who is aggrieved by the workings of the Government." S.Rep. No. 1992, 87th Cong., 2d Sess. 3, *reprinted in* 1962 U.S. Code Cong. & Ad. News 2786.

Further, it is clear from the legislative history of the mandamus statute, 28 U.S.C. § 1361, that the act does not change common law rules for mandamus actions. S.Rep. No. 1992, 87th Cong., 2nd Sess. (1962), *reprinted in* 1962 U.S. Code Cong. & Ad. News 2784. However, without explanation, the Tenth Circuit abandoned the common law rule that mandamus, not an action at law, is the only appropriate remedy where there is an ongoing breach of a clear duty and a legal remedy can only resolve past not future breaches. *Kendall v. United States ex rel. Stokes,* 37 U.S. (12 Pet.) 524 (1838). Here the State properly sought an equitable remedy in district court rather than an inadequate legal remedy in the Claims Court.

Similarly, the Tenth Circuit erred when it rejected the Administrative Procedures Act's waiver of sovereign immunity, 5 U.S.C. § 702, and its corresponding jurisdictional provision, 28 U.S.C. § 1331, as an appropriate basis for bringing this case

in district court. The effect of the Tenth Circuit's decision is that wrongful actions by federal officers may not be reviewed in the district courts if the actions involve the unlawful withholding of payment of more than $10,000.

The Second Circuit in a recent case examined the interplay of 28 U.S.C. § 1331, 5 U.S.C. § 702 and Claims Court jurisdiction under 28 U.S.C. § 1491(a). *B.K. Instrument, Inc. v. United States,* 715 F.2d 713, 727 (2nd Cir. 1983). B.K. Instrument sought declaratory relief, an injunction cancelling a contract awarded by the United States to another bidder, directing the contract be awarded to it, and judgment for its bid preparation costs. The Second Circuit held the district court had subject matter jurisdiction under 28 U.S.C. § 1331 of a non-contract action founded on an Act of Congress. Judge Friendly explained that the Claims Court did not have exclusive jurisdiction of every non-contract claim involving money that was founded on a federal statute:

> A literal reading of the "founded either upon" language of § 1491(a) would mean that all claims of wrongful action by federal officials involving more than $10,000 would have to be brought in the Claims Court – a result clearly in conflict with historic practice and with the plain intent of Congress in the 1976 amendments to § 702 of the APA and 28 U.S.C. § 1331 to make § 1331 the vehicle for actions "seeking relief other than money damages" for unlawful acts of federal agencies, officers or employees in cases where judicial review had not been expressly provided.

715 F.2d at 727.

Although New Mexico's claim involves money, it is fundamentally an equitable action. New Mexico seeks mandatory and declaratory relief. New Mexico's suit is founded on an Act of Congress which plainly states how New Mexico's share of Mineral Leasing Act revenues shall be computed. No federal

discretion is involved. No other states compete for New Mexico's share. Additional amounts will continue to accrue year by year, requiring a declaration of New Mexico's future rights under the Mineral Leasing Act. Jurisdiction here was clearly appropriate under 28 U.S.C. §§ 1331 and 1361.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

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Counsel for Petitioner

January 7, 1985

APPENDIX A

STATE OF NEW MEXICO,
Plaintiff-Appellee,

v.

Donald T. REGAN, etc.,
Defendant-Appellant.

No. 83-1981.

United States Court of Appeals,
Tenth Circuit.

Oct. 9, 1984.

Paul G. Bardacke, Atty. Gen. of the State of New Mexico (Charlotte Uram, Asst. Atty. Gen., Santa Fe, N.M., Norman S. Thayer and Ronald Segel of Sutin, Thayer & Browne, Albuquerque, N.M., with him on the briefs), for plaintiff-appellee.

John J. McCarthy, Dept. of Justice, Washington, D.C. (Glenn L. Archer, Jr., Asst. Atty. Gen., Michael I. Paup, Ernest J. Brown, David English Carmack, Washington, D.C., with him on the briefs), for defendant-appellant.

Before HOLLOWAY, SETH and BARRETT, Circuit Judges.

BARRETT, Circuit Judge.

This case involves the interplay of two federal statutes, the Mineral Lands Leasing Act of 1920, 30 U.S.C. §§ 181 *et seq.*, and the Crude Oil Windfall Profits Tax Act of 1980, 26 I.R.C. §§ 4986 *et seq.* The Mineral Lands Leasing Act (Mineral Act) directs the Secretary of the Treasury to pay fifty percent (50%) of all mineral royalties received from federal lands to the states in which the leased federal lands are located. Pursuant to the

Crude Oil Windfall Profits Tax Act (COWPTA), however, these same federal royalties are subject to a federal tax. The question is thus raised whether the United States should impose the windfall profits tax on federal royalties before or after it computes the 50% share of the royalties owed to the states.

Donald T. Regan, Secretary of the Treasury of the United States, has taken the position that the states' shares must be calculated *after* deducting the windfall profits tax, and has in fact calculated the states' shares by this method since the passage of COWPTA in 1980. Taking the contrary position, the State of New Mexico brought the present action against Regan in 1981 claiming that the Mineral Act requires payment to the states of 50% of federal royalties undiluted by the windfall profits tax. New Mexico consequently sought to recover 50% of the federal royalties used to pay the windfall profits tax, together with interest, an accounting, declaratory relief, and its attorney fees. The district court granted New Mexico's motion for summary judgment, awarding completely the state's requested relief.

Secretary Regan appeals from this decision, asserting that the court's position is contrary to the intent of Congress in passing COWPTA and the Mineral Act. In addition, he argues that even if the court properly construed the applicable statutes, it erred in awarding the states prejudgment interest on the royalties withheld. Finally, Secretary Regan contends that because this is a suit against the United States to which it has not consented, the district court lacked jurisdiction to entertain New Mexico's suit. We will begin with an analysis of the jurisdictional issue.

The District Court's Jurisdiction

It is unclear from the district court's opinion whether it considered New Mexico's suit to be an action against the United States. The court did hold, however, that if such were

the case the district court nonetheless possessed jurisdiction by virtue of 28 U.S.C. § 1331, 5 U.S.C. §§ 701 *et seq.* (the Administrative Procedure Act), 28 U.S.C. § 1361 (federal mandamus), and 28 U.S.C. § 2201 (declaratory judgment). According to the court, these statutes granted the United States' consent to suit in the district court.

As an initial matter, we hold that New Mexico's suit is indeed an action against the United States. Although Secretary Regan is the nominal defendant in the suit, sovereign immunity is determined not by the party named as the defendant, but by the issues presented and the effect of the judgment. *Transwestern Pipeline Co. v. Kerr-McGee Corp.*, 492 F.2d 878, 884 (10th Cir. 1974) *cert. dismissed* 419 U.S. 1097, 95 S.Ct. 691, 42 L.Ed.2d 689 (1975). If the relief sought against a federal officer in fact operates against the sovereign, then the action must be deemed as one against the sovereign. *Hawaii v. Gordon*, 373 U.S. 57, 58, 83 S.Ct. 1052, 1052-53, 10 L.Ed.2d 191 (1963).

New Mexico correctly points out that an exception to this general rule is recognized when a suit is brought against a governmental official challenging his or her *ultra vires* actions. *See Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 689, 69 S.Ct. 1457, 1461, 93 L.Ed. 1628 (1949). Assuming arguendo that this exception could be properly invoked in the present case,[1] the Supreme Court has rejected its application

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[1] In our view it is doubtful that Secretary Regan's method of computing the states' royalties could be deemed *ultra vires*. New Mexico's challenge does not accurately rest upon the Secretary's lack of *delegated power* to determine the state's royalty, but rather that the Secretary's decision was *incorrect* as a matter of law. The Supreme Court has rejected such arguments asserted in the attempt to avoid the shield of sovereign immunity, and has held that actions of an officer within his *statutory authority* are the actions of the sovereign. *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 693-95, 69 S.Ct. 1457, 1463-64, 93 L.Ed. 1628 (1949).

when "the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property." *Id.* at 691 n. 11, 69 S.Ct. at 1462 n. 11 (citing *North Carolina v. Temple,* 134 U.S. 22, 10 S.Ct. 509, 33 L.Ed. 849 (1890)). *See also Hawaii v. Gordon, supra.* The relief sought by New Mexico would, in our view, require affirmative action by the sovereign or the disposition of sovereign property. New Mexico seeks to change in a significant manner the Secretary's methods of calculating the windfall tax and state royalties; this change would clearly reduce amounts already collected in the Treasury pursuant to the windfall profits tax[2] and require the payment of substantial sums to New Mexico. Thus, as a practical matter, the "essential nature and effect of the proceeding" is such "that the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration." *Land v. Dollar,* 330 U.S. 731, 738, 67 S.Ct. 1009, 1012, 91 L.Ed. 1209 (1947). *See also Dugan v. Rank,* 372 U.S. 609, 620, 83 S.Ct. 999, 1006, 10 L.Ed.2d 15 (1963); *Mine Safety Co. v. Forrestal,* 326 U.S. 371, 375, 66 S.Ct. 219, 221, 90 L.Ed. 140 (1945).

Having concluded that New Mexico's suit is directed against the United States, we must determine whether the United States has consented to such suits in federal district court. *See United States v. Sherwood,* 312 U.S. 584, 586, 61 S.Ct. 767, 769, 85 L.Ed. 1058 (1941). The district court, as has been mentioned, based its finding of jurisdiction upon 28 U.S.C.

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[2] In its complaint New Mexico noted that the Treasury had collected $3,255,000 in federal royalties from federal lands in New Mexico over a five-month period in 1980. Reducing the taxable royalties derived from public lands located in New Mexico by 50% for this five-month period alone would significantly decrease federal revenues, not to mention the dramatic national impact of such a change when considering its future application to all federal lands.

§ 1331, and the waivers of sovereign immunity found in 5 U.S.C. § 702 (the Administrative Procedures Act), and 28 U.S.C. §§ 1361, 2201 (federal mandamus and declaratory judgment). While 28 U.S.C. § 1331 grants to the district court broad subject matter jurisdiction over all civil actions arising under the Constitution, laws, or treaties of the United States, that section does not include a general waiver of sovereign immunity by the United States. *See B.K. Instrument, Inc. v. United States,* 715 F.2d 713, 724 (2d Cir. 1983). We must therefore look elsewhere in order to examine the extent to which the United States has consented to suit in district court.

Section 702 of the Administrative Procedure Act contains a limited waiver of the United States' sovereign immunity. That section reads in pertinent part:

> A person suffering legal wrong because of agency action . . . is entitled to judicial review thereof. An action . . . *seeking relief other than money damages* . . . shall not be dismissed . . . on the ground that it is against the United States.

Thus, § 702 has been construed as granting the United States' consent to suit in cases involving agency action, subject however, to the proviso that the action is not one for "money damages."

New Mexico contends, and the district court held, that the present action is not one for "money damages" and that § 702 thus provides the necessary consent to suit. In reaching this conclusion, the district court reasoned as follows:

> The State of New Mexico has requested the specific relief of one-half of those royalties received from crude oil production from federal lands within New Mexico which were used by the United States to pay the windfall profits tax. The fact that the requested relief is for specific monies held by the Treasury does not mean that the requested relief is for money damages. Damages are a sum of money used as

> substitutionary relief. Such relief is given to the plaintiff to substitute for a suffered loss which may not have been originally a monetary loss. Dobbs, *Handbook of the Law of Remedies*, 135, (1973). Specific relief, on the other hand, is an attempt to give back to the plaintiff that which he actually lost, not a sum measured by the amount of the loss, but the loss itself. Dobbs, at 135 . . . . This action seeks specific, declaratory and mandamus relief.

New Mexico v. Donald T. Regan, No. 81-452-M Civil, at 6 (D.N.M. June 8, 1983).

We must conclude, however, that the district court failed to to ascertain the intent of Congress by engaging in its semantic discussion of the meaning of the word "damages."[3] Section 702 expressly states: "Nothing herein . . . confers authority to grant relief if any other statute that grants consent to suit *expressly* or *impliedly* forbids the relief which is sought." (Emphasis

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[3] We note that the legislative history behind § 702 supports a broader view of the term "damages" than that held by the district court. For example, House Report 94-1656 states:

> The first of the additional sentences provides that claims challenging official action or nonaction, and seeking relief other than money damages, should not be barred by sovereign immunity. *The explicit exclusion of monetary relief makes it clear that sovereign immunity is abolished only in actions for specific relief* (injunctions, declaratory judgment, mandatory relief, etc.).

H.R. No. 94-1656, 94th Cong. 2d Sess. (1976), 5 U.S.Code Cong. and Admin.News, 6121, 6131 (emphasis added).

There is nothing in the legislative history which supports the proposition that the use of the word "damages" was intended by Congress to exclude certain claims for money not falling within technical common law concepts of "damages." Rather, the history supports the view that § 702 should be read with a practical eye, with the focus upon the effect of the claim—does it involve a claim for money, or does it seek only to effect action? It is solely the latter class of claims which fall within the consent to suit granted by § 702. A contrary view would seemingly run counter to the Tucker Act's express scheme for monetary claims against the United States (discussed *infra* in text at 1322).

added.) The legislative history supporting § 702 states unequivocally that the provision is to be read in conjunction with other jurisdictional statutes waiving sovereign immunity, and, as an example, points out that the "Tucker Act impliedly forbids relief other than the remedy provided by [that] Act." H.R. No. 94–1656, 94th Cong. 2d Sess. (1976), 5 U.S.Code Cong. and Admin.News, 6121, 6133. *See also American Science & Engineering, Inc. v. Califano,* 571 F.2d 58, 63 (1st Cir. 1978).

The Tucker Act (codified at 28 U.S.C. §§ 1346, 1491) grants concurrent jurisdiction to the district court and the Claims Court (formerly the Court of Claims) over money claims against the United States not exceeding $10,000. For claims against the United States involving amounts greater than $10,000 founded upon the Constitution, Acts of Congress, executive regulations, or contracts, the Act vests *exclusive* jurisdiction with the Claims Court. *Amalgamated Sugar Co. v. Bergland,* 664 F.2d 818, 823 (10th Cir. 1981); *Laguna Hermosa Corp. v. Martin,* 643 F.2d 1376, 1379 (9th Cir. 1981); *Chelsea Community Hospital v. Michigan Blue Cross,* 630 F.2d 1131, 1136 (6th Cir. 1980).

Several courts have noted that when the "prime objective" or "essential purpose" of the complaining party is to obtain money from the federal government (in an amount in excess of $10,000), the Claims Court's exclusive jurisdiction is triggered. *See Alamo Navajo School Board, Inc. v. Andrus* 664 F.2d 229, 233 (10th Cir. 1981) *cert. denied,* 456 U.S. 963, 102 S.Ct. 2041, 72 L.Ed.2d 487 (1982); *B.K. Instrument, Inc. v. United States, supra,* 715 F.2d at 727; *Bakersfield City Sch. Dist. of Kern Cty. v. Boyer,* 610 F.2d 621, 628 (9th Cir. 1979); *Hoopa Valley Tribe v. United States,* 596 F.2d 435–36 (Ct.Cl. 1979). Consequently, the Claims Court's exclusive jurisdiction may not be avoided by framing a complaint in the district court as one seeking injunctive, declaratory, or mandatory relief when, in reality, the thrust of the suit is one seeking money from the

United States. *Amalgamated Sugar Co. v. Bergland, supra* at 824; *Chelsea Community Hospital v. Michigan Blue Cross, supra* at 1136; *Laguna Hermosa Corp. v. Martin, supra* at 1379; *Hoopa Valley Tribe v. United States, supra* at 436. Similarly, a plaintiff may not transform a claim for monetary relief into an equitable action simply by asking for an injunction that orders the payment of money. *Jaffee v. United States,* 592 F.2d 712, 715 (3rd Cir. 1979) *cert. denied,* 441 U.S. 961, 99 S.Ct. 2406, 60 L.Ed.2d 1066 (1979).

The district court concluded that the Claims Court could not assert jurisdiction over New Mexico's suit because of the "equitable relief" requested by the state. We disagree. New Mexico's claim for past royalties and prejudgment interest is clearly founded upon provisions of an "Act of Congress" (the Mineral Act), and exceeds the $10,000 jurisdictional limit of the Tucker Act. New Mexcio's primary purpose is to fix the government's and not the Secretary's liability; accordingly, we must conclude that the suit is essentially one designed to reach money which the government owns. *See Mine Safety Co. v. Forrestal, supra* 326 U.S. at 375, 66 S.Ct. at 221. This, then, is a claim for money cognizable under the Act. New Mexico's additional requests for an accounting and declaratory relief are merely incidental and subordinate to the basic suit for money. Although such has not always been the case, the Claims Court may now grant equitable relief as an incident to the award of money in the interest of affording complete justice to the parties. 28 U.S.C. § 1491(a)(3) (1976) (*as amended by* Pub.L. No. 97-164, 96 Stat. 25). *See Ellis v. United States,* 610 F.2d 760, 762 (Ct.Cl. 1979).

New Mexico argues that the federal mandamus and declaratory judgment statutes (28 U.S.C. §§ 1361, 2201) provide the district court with an alternative basis of jurisdiction. While this argument, standing alone, has merit, we believe that allowing the district court to entertain these equitable claims would

be improper in the context of this case. Having concluded that New Mexico's claim is primarily one for money over which the Claims Court possesses exclusive jurisdiction, it would not be in the interest of justice or public policy to allow the district court to determine New Mexico's incidental equitable claims. It is settled that the declaratory judgment statute does not itself confer jurisdiction on a federal court where none otherwise exists. *Amalgamated Sugar Co. v. Bergland, supra* at 822. In addition, several courts have specifically concluded that mandamus is not available in the district court when relief can be granted in the Claims Court. *See, e.g., American Science & Engineering, Inc. v. Califano, supra* at 64; *Carter v. Seamans,* 411 F.2d 767, 774 (5th Cir. 1969) *cert. denied,* 397 U.S. 941, 90 S.Ct. 953, 25 L.Ed.2d 121 (1970). This court has similarly noted the general principle that mandamus should not be invoked if adequate alternative relief is available at law. *United States v. West,* 672 F.2d 796, 799 (10th Cir. 1982) *cert. denied,* 457 U.S. 1133, 102 S.Ct. 2959, 73 L.Ed.2d 1350 (1982). Finally, as we have previously noted, the Claims Court does not *lose* jurisdiction when equitable claims are asserted in conjunction with primary claims for money against the United States. Similarly, the district court should not *gain* jurisdiction over what is fundamentally a Tucker Act claim simply because the complaint contains requests for equitable relief. *See Portsmouth Redevelopment & Housing Authority v. Pierce,* 706 F.2d 471, 474 (4th Cir. 1983) *cert. denied,* ___U.S.___, 104 S.Ct. 392, 78 L.Ed.2d 336 (1983).

We must conclude, therefore, that the trial court lacked jurisdiction to enter summary judgment in favor of New Mexico. We need not discuss the remaining issues raised by the appellant.

We direct that this case be transferred to the United States Claims Court for adjudication on the merits "in the interest of

justice" rather than dismissing the suit.[4] *See Keller v. Merit Systems Protection Board*, 679 F.2d 220, 223 (11th Cir. 1982). *Accord, Dr. John T. MacDonald Foundation v. Califano*, 571 F.2d 328, 332 (5th Cir. 1978) (en banc), *cert. denied*, 439 U.S. 893, 99 S.Ct. 250, 58 L.Ed.2d 238 (1978).

The case is transferred to the United States Claims Court pursuant to 28 U.S.C. § 1631.

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[4] 28 U.S.C. § 1631 provides:

Whenever a civil action is filed in a court as defined in section 610 of this title [28 U.S.C. § 610] or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed or noticed for the court to which it is transferred on the date upon which it was actually filed or noticed for the court from which it is transferred.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

FILED
United States
District Court
Albuquerque,
New Mexico
June 8, 1983
Jesse Casaus,
Clerk

STATE OF NEW MEXICO,
Plaintiff,
v.
DONALD T. REGAN, Secretary of the Treasury of the United States of America,
Defendant.

No. 81-452-M Civil

MEMORANDUM OPINION AND ORDER

This case raises the interplay of two federal statutes, the Mineral Lands Leasing Act of 1920, as amended, 30 U.S.C. § 181 *et seq.*, and the Crude Oil Windfall Profits Tax Act of 1980, 26 I.R.C. § 4986 *et seq.*. The Crude Oil Windfall Profits Tax Act (COWPTA) imposes a federal tax on royalties owed to the United States from crude oil produced on federal lands. The Mineral Lands Leasing Act (Mineral Act) directs the Secretary of the Treasury to pay 50% of "[a]ll money received from sales, bonuses, royalties . . . and rentals of the public lands" to the states, except Alaska, in which the leased federal lands are located. The issue presented is whether the United States should impose the windfall profits tax on its royalties before or after it computes the 50% share of the royalties owed to the State of New Mexico.

The State of New Mexico has brought this suit against Donald T. Regan, the Secretary of the Treasury, to recover

the royalties which it claims it is due under the Mineral Act. Jurisdiction is invoked pursuant to 28 U.S.C. §§ 1331(a), 1361 and 2201 and 5 U.S.C. § 701 *et seq.*. The State has asked for specific relief in the form of 50% of those royalties arising from the production of crude oil from federal lands in New Mexico used to pay the windfall profits tax, together with interest, an accounting, declaratory relief and its attorney fees. The States of Utah, Hawaii and Texas were given leave to intervene as *amicus curiae* but have filed no briefs.

I

The Secretary of the Treasury has raised a number of jurisdictional issues throughout the course of this suit. While I find these arguments to be without merit, I will briefly address each one. The Secretary first argues that this suit is barred by the Anti-Injunction Act, 26 U.S.C. § 7421, and the tax exception to the Declaratory Judgment Act, 28 U.S.C. § 2201. The Anti-Injunction Act provides that no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person. The Declaratory Judgment Act provides for declaratory relief "except with respect to federal taxes". The Secretary has argued that the State of New Mexico is attempting in this suit to restrain the collection of the windfall profits tax or to obtain declaratory relief with respect to the COWPTA. He further argues that the judicial exceptions set out in *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1 (1962), and *Bob Jones University v. Simon*, 416 U.S. 724 (1974), cannot apply here.

I find that the Secretary has misconstrued the nature of this suit. As the State explains in its briefs, the purpose of this suit is not to restrain the United States from assessing or collecting the windfall profits tax. Nor is its purpose to declare the rights of the respective parties under the COWPTA. The State is seeking to compel the Secretary to comply with § 35, as amended,

of the Mineral Act, 30 U.S.C. § 191, and pay 50% of the royalties received from federal lands in New Mexico with respect to oil production to the State. The COWPTA comes into issue because the Secretary has determined that he must first compute and withhold the windfall profit tax from the royalties before calculating the 50% share due to the State.

The purposes of the Anti-Injunction Act are to protect the government's need for expeditious tax collections and to require that tax disputes be determined in tax refund suits. *Bob Jones University v. Simon,* 416 U.S. 724 (1974); *Lewis v. Reagan,* 516 F.Supp. 548 (D.D.C. 1981). Since the State is not the holder of any economic interest with respect to crude oil produced on federal leases within the boundaries of New Mexico, the State is not a taxpayer under the COWPTA. It would be illogical to suggest to the State that it must bring a refund suit in order to obtain its relief. *See, Tax Analysts and Advocates v. Schultz,* 376 F.Supp. 889 (D.D.C. 1974).

If the State is granted the relief it requests, the United States will not be restrained from assessing or collecting the windfall profits tax. In this unique situation, the United States is both the payor and the recipient of the tax. The relief sought by the State will only determine when the tax is to be assessed—before or after the Secretary of the Treasury determines the share due to the State pursuant to the Mineral Act.

The tax exception to the Declaratory Judgment Act prevents, by declaratory relief, what the Anti-Injunction Act precludes by injunctive relief. *Tax Analysts and Advocates v. Schultz, supra. See, Bob Jones University v. Simon,* 416 U.S. 725, 732, n.7 (1974). If this were a suit to declare whether taxes were due under the COWPTA, it would be barred by the Declaratory Judgment tax exception. *See, e.g., Lewis v. Reagan, supra.* However, neither party contends that windfall profits taxes are not due from the United States, the holder of the economic interests with respect to crude oil produced from

federal leases. The sole issue to be decided is whether the windfall profits tax should be assessed before or after the State's share of the royalties is computed pursuant to the Mineral Act.

The Secretary has argued that this court lacks personal jurisdiction over the defendant since the relief requested would be obtained against the sovereign and the United States has not waived its sovereign immunity. *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682 (1949). The Secretary further argues that since this is a suit for money damages, the waiver of sovereign immunity contained in the Administrative Procedures Act, 5 U.S.C. § 702, cannot apply.

I do not find that this is a suit for money damages. The State of New Mexico has requested the specific relief of one-half of those royalties received from crude oil production from federal lands within New Mexico which were used by the United States to pay the windfall profits tax. The fact that the requested relief is for specific monies held by the Treasury does not mean that the requested relief is for money damages. Damages are a sum of money used as substitutionary relief. Such relief is given to the plaintiff to substitute for a suffered loss which may not have been originally a monetary loss. Dobbs, *Handbook of the Law of Remedies*, 135,(1973). Specific relief, on the other hand, is an attempt to give back to the plaintiff that which he actually lost, not a sum measured by the amount of the loss, but the loss itself. Dobbs, at 135.

In its prayer, the State has requested specific relief—the very monies which were used by the United States to pay the tax rather than distributed to the State. This action seeks specific, declaratory and mandamus relief, and states a claim that the Secretary of the Treasury Regan has failed to act in his official capacity or under color of legal authority. I find that the case should not be dismissed on the grounds that it is against the United States or that the United States is an indispensable party. The Administrative Procedures Act provides for jurisdiction over the defendant. 5 U.S.C. § 702.

Lastly, the Secretary argues that this case should have been brought in the United States Claims Court under 28 U.S.C. § 1491. The Secretary's argument is premised on his contention that this is a suit for money damages. As I have explained, the State is seeking declaratory, mandamus and specific relief. While the State is also asking for interest, any interest awarded is merely collateral to the primary relief sought. As an equitable proceeding, this case cannot be brought in the United States Claims Court. *U.S. v. King*, 395 U.S. 1 (1969). That court can only provide equitable relief when it is "an incident of and collateral to any" money judgment. 28 U.S.C. § 1491(2). That situation is not applicable here.

The State of New Mexico outlined the steps it has taken to attempt to resolve this dispute through administrative channels. These steps were unsuccessful and I find that the State has exhausted its administrative remedies. Since the State is without means to resolve its dispute other than through this lawsuit, I find that jurisdiction exists here pursuant to 28 U.S.C. §§ 1331(a), 1361 and 2201 and 5 U.S.C. § 701 *et seq.*.

II

Turning to the merits, I find that the Mineral Act requires that the Secretary of the Treasury remit 50% of all royalties received by the Treasury from the production of crude oil on leased lands within the State of New Mexico to the State undiminished by any windfall profits tax. I am not persuaded that Congress intended in passing the COWPTA impliedly to amend the Mineral Act to change the method of allocating oil production royalties on leased lands between the United States and the various states. Nor am I convinced by the Secretary's argument that since two streams of income—one designated as royalties and the other designated as windfall profits taxes—are paid to the Treasury, the Mineral Act only requires that 50% of the stream designated as royalties be paid over to the State. The

plain language and clear meaning of the two statutes in question lead me to the conclusion that the State of New Mexico is entitled to one-half of all royalties, as that term is defined by the Mineral Act, arising from federally leased lands within the State.

Section 35 of the Mineral Act, as amended, 30 U.S.C. § 191, provides in part that:

> All money received from sales, bonuses, royalties . . . and rentals of the public lands under the provisions of this Chapter . . . shall be paid into the Treasury of the United States; fifty per-centum thereof shall be paid by the Secretary of the Treasury to the State other than Alaska within the boundaries of which the leased lands or deposits are or were located . . . .

(The Act provides that Alaska shall receive 90% of the royalties arising from lands within the State of Alaska.)

Pursuant to § 17 of the Mineral Act, 30 U.S.C. § 226(a), the Secretary of the Interior or his agents have leased public lands containing oil and gas within the State of New Mexico. These leases provide that a royalty shall be paid to the Secretary of the Interior. The Mineral Act further provides that the royalty shall be not less than twelve and one-half percent of the amount or value of the production of oil or gas removed or sold from the lease. 30 U.S.C. § 226(b)(1) and (c).

Under his statutory authority, 30 U.S.C. § 189, the Secretary of Interior has promulgated rules and regulations explaining how the twelve and one-half percent royalty is to be computed. 30 C.F.R. § 221.47 provides that:

> The value of production, for the purpose of computing royalty shall be the estimated reasonable value of the product as determined by the supervisor, due consideration being given to the

> highest price paid for a part or for a majority of production of like quality in the same field, to the price received by the lessee, to posted prices and to other relevant matters. Under no circumstances shall the value of production of any of said substances for the purposes of computing royalty be deemed to be less than the gross proceeds accruing to the lessee from the sale thereof or less than the value computed on such reasonable unit value as shall have been determined by the Secretary. In the absence of good reason to the contrary, value computed on the basis of the highest price per barrel, thousand cubic feet, or gallon paid or offered at the time of production in a fair and open market for the major portion of like-quality oil, gas or other products produced and sold from the field or area where the leased lands are situated will be considered to be a reasonable value.

It is clear that the value of crude oil for the purposes of determining royalties under the Mineral Act is determined by the value of production from the leasehold. The Mineral Act and its regulations do not provide for an adjustment to that value for any tax.

The COWPTA of 1980, 26 I.R.C. § 4986 *et seq.*, is designed to tax those windfall profits resulting from the production of crude oil in the United States generated by the federal deregulation of oil production and by the increase in worldwide oil prices by the OPEC cartel. S.Rep. No. 96-394, 96th Cong., lst Sess. 6 reprinted in [1980] U.S. Code Cong. & Ad. News 417; H.Rep. No. 36-304, 96th Cong. 1st Sess. 7, reprinted in [1980] U.S. Code Cong. & Ad. News 594. The Act imposes an excise tax on the windfall profits at the time the oil is removed from the premises. 26 I.R.C. § 4986. The tax is assessed against the producer of the crude oil who is defined as the holder of an economic interest with respect to the oil. 26 I.R.C. §§ 4986, 4996.

The COWPTA imposes the tax on the United States insofar as it holds an economic interest with respect to any crude oil. 26 I.R.C. §§ 4991, 4994. Thus, crude oil royalties received by the United States from lands which were leased pursuant to the Mineral Act are subject to the tax. The COWPTA provides, however, that if the economic interests are held by a state, its political subdivision or a state agency, and the net income received is dedicated to a public purpose, the income is not subject to any windfall profits tax. 26 I.R.C. § 4994(a). It is agreed by all parties that the United States is the holder of the economic interest with respect to any crude oil produced on federally leased lands within the State of New Mexico.

Although the tax is assessed against the producer, the Act originally provided that the first purchaser of the crude oil would withhold the windfall profits tax and deposit the funds with the federal government. 26 I.R.C. § 4995. After January 19, 1981, however, the Secretary of the Treasury promulgated amended regulations to allow the operator-lessee of the federal lease to submit one payment to the United States to cover the royalty and any windfall profits tax due on the federal royalty.

While the United States Geological Survey, as the collection agent for the Treasury Department, receives one lump-sum payment, it treats the payments as though it were composed of two elements. The first element, the windfall profits tax computed on the royalty, is deposited into the United States Treasury as a tax receipt. The second element, the net royalty after the windfall profits tax, is deposited into the United States Treasury to be distributed according to the Mineral Act.

The Mineral Act, on its face, requires that "[a]ll money received from . . . royalties . . . *shall* be paid into the Treasury of the United States; fifty percent thereof *shall* be paid by the Secretary of the Treasury to the State other than Alaska within the boundaries of which the leased lands or deposits are or were

located." 30 U.S.C. § 191. (emphasis added). The term "royalties" is defined (as I explained earlier) as twelve and one-half percent of the value of the production removed or sold from a federal lease. 30 U.S.C. § 226(b) and (c).

When the Secretary assesses the windfall profits tax on the federal royalty prior to its deposit into the Treasury of the United States, the tax reduces the amount of money to be deposited as a "royalty" to less than twelve and one-half percent of the value of the crude oil produced from the federal lease. Thus, when the United States Geological Survey divides the lump-sum payment it receives from the operator-lessor of federal leases into a windfall profits tax payment and a "net" royalty, the two sums equal twelve and one-half percent of the value of the produced crude oil.

The Mineral Act could hardly be more explicit. It directs that all money received from royalty shall be paid into the Treasury. Since royalties are further defined by the Mineral Act to be twelve and one-half percent of the value of the produced mineral, it seems clear that a dollar amount equal to twelve and one-half percent of the value of production must be deposited as a royalty into the Treasury. Thereafter, the Mineral Act directs the Secretary to pay 50% of this dollar amount to the treasuries of the various states. 30 U.S.C. § 191.

While the COWPTA imposes its tax on the royalties received by the United States from its lands leased pursuant to the Mineral Act, it does not state how the tax is to be imposed. Nor does its legislative history address the issue in this case—whether the windfall profits tax is to be imposed before or after the Secretary of the Treasury pays over 50% of the royalties received from federal leases within the State of New Mexico to the State.

The Senate and House reports provided that "each investor and royalty owner who owns an economic interest in the oil

(including governmental units and organizations . . .) is liable for tax on its share of the gross revenues," but does not discuss the Mineral Act. S.Rep. No. 96-394, 96th Cong., 1st Sess. 60, reprinted in [1980] U.S. Code Cong. & Ad. News 469; H.Rep. No. 96-304, 96th Cong., 1st Sess. 39, reprinted in [1980] U.S. Code Cong. & Ad. News 620. The House Conference Committee Report, compiled several months after the two previous Reports, rejected a Senate amendment that would have exempted oil production owned by the federal government from the tax. Instead, the Conference Committee decided to follow the House Bill making federal oil production subject to the windfall profits tax. H.C.Rep. No. 96-817, 96th Cong., 2d Sess. 107, reprinted in [1980] U.S. Code Cong. & Ad. News 660. The House Conference Committee Report, however, failed to discuss the effect, if any, this tax provision would have on the payments required to be made to the various states under the Minerals Act.

The Secretary relies extensively on remarks made by Senators Long, Wallop and Schmidt during the floor debate on the House Conference Committee Report on the COWPT Bill. The Senators' remarks are evidence that they understood that the Bill, as it stood after the House Conference Committee Report, was subjecting the states' 50% share of the federal royalties to the windfall profits tax. 126 Cong.Rec. 2623, 2624, 2825, 2826, 3030, 3031 (1980). To what extent their understanding of the interaction between the COWPTA and the Mineral Act was shared in by other members of Congress is not at all clear to me. "The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history." *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979).

The remarks of these Senators do not convince me that Congress intended impliedly to amend or alter the royalty sharing formula of the Mineral Act. Implied amendments, like implied repeals, are not favored. *See, Watt v. Alaska*, 451 U.S. 259, 267 (1981); *Morton v. Mancari*, 417 U.S. 535, 549-51

(1974). The remarks or understanding of a handful of Senators do not manifest the clear intent of the Congress impliedly to alter the Mineral Act by passing the COWPTA. The fact that Congress chose to impose an excise tax on federal royalties and yet failed to clarify how that tax would effect the computation of the sums required to be paid to the State under the Mineral Act leads me to the conclusion that Congress did not intend to alter the computational scheme of the Mineral Act.

Since the COWPTA is silent on the interplay between it and the Mineral Act, I must conclude that the plain language of the Mineral Act is still controlling. The Secretary of the Treasury must remit the State of New Mexico's share of the royalties received as a result of the production of crude oil on federally leased lands before imposing the windfall profits tax on the royalties. The two statutes are not mutually exclusive; they can be construed in *pari materia* so as to allow both statutes to be given full effect. *Morton v. Mancari,* at 551 (1974); *Estate of Sanford v. Commissioner,* 308 U.S. 39 (1939), *reh. den.* 308 U.S. 637 (1939). The excise tax imposed by the COWPTA against the economic interest of the United States in the crude oil produced on federal leases can still be assessed, albeit after the Secretary has paid over one-half of the twelve and one-half percent royalty to the State of New Mexico. The mandate of both statutes can be followed, even though the net result will mean that the State will receive its share of the royalties unreduced by any windfall profits tax while the United States will assume in its share of the royalties, the entire burden of the windfall profits tax. Now, Therefore,

IT IS ORDERED that the State of New Mexico shall be and hereby is granted the specific relief of 50% of all monies used to pay the windfall profits tax on crude oil produced on federally leased lands within the State's boundaries since the enactment of the COWPTA together with interest.

IT IS FURTHER ORDERED that the State of New Mexico shall be, and hereby is, granted an accounting to account for

all withheld royalties used to pay windfall profits tax on crude oil produced on federally leased lands within the State of New Mexico.

IT IS FURTHER ORDERED that the State of New Mexico shall be, and hereby is, granted its declaratory relief. It is declared that the Mineral Act requires that the Secretary of the Treasury collect all royalties resulting from the production of crude oil on federally leased land within the State of New Mexico unreduced by the tax imposed by the COWPTA of 1980.

IT IS FURTHER DECLARED that the Mineral Act requires that the Secretary of the Treasury pay over 50% of the royalties received from the production of crude oil to the State of New Mexico required by the Act before assessing any windfall profits tax against the royalties.

IT IS FURTHER ORDERED that the State of New Mexico's request for attorney fees shall be, and hereby is, denied.

/s/ E. L. Mechem

SENIOR UNITED STATES
DISTRICT JUDGE

APPENDIX C

5 U.S.C. § 702.

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground, or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

28 U.S.C. § 1331.

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1346(a)(2).

> (a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

28 U.S.C. § 1361.

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

28 U.S.C. § 1491(a).

(a)(1) The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Claims Court shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 10(a)(1) of the Contract Disputes Act of 1978.

(3) To afford complete relief on any contract claim brought before the contract is awarded, the

court shall have exclusive jurisdiction to grant declaratory judgments and such equitable and extraordinary relief as it deems proper, including but not limited to injunctive relief. In exercising this jurisdiction, the court shall give due regard to the interests of national defense and national security.

28 U.S.C. § 2201.

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 or a proceeding under section 505 or 1146 of title 11, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

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No. 84-1105

In the Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF NEW MEXICO, PETITIONER

v.

JAMES A. BAKER III, SECRETARY OF THE TREASURY OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that the instant action is one seeking essentially monetary relief against the United States in an amount in excess of $10,000, and hence that jurisdiction over the action lies in the Claims Court and not in the district court.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 745 F.2d 1318. The memorandum of the district court (Pet. App. 11a-22a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 9, 1984. The petition for a writ of certiorari was filed on January 7, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Mineral Lands Leasing Act of 1920, the Secretary of the Interior is authorized to lease federally-owned lands containing oil deposits to third parties for the purpose of extracting oil. Act of Feb. 25, 1920, ch. 85, § 35, 41 Stat. 450 (currently codified at 30 U.S.C. 191). The Act

directs that "[a]ll money received from * * * royalties * * * and rentals of the public lands" shall be paid into the United States Treasury and thereafter be apportioned according to formula (30 U.S.C. 191). Under that apportionment formula (with certain exceptions applicable to Alaska), the Secretary of the Treasury is directed to pay 50% of the royalties to the state "within the boundaries of which the leased land * * * are * * * located," to pay 40% of the royalties to a Reclamation Fund established by Congress in 1902, and to credit 10% of the royalties to miscellaneous receipts (30 U.S.C. 191).

On April 2, 1980, Congress enacted the Crude Oil Windfall Profit Tax Act, Tit. I, Pub. L. No. 96-233, 94 Stat. 230 *et seq.* (currently codified at 26 U.S.C. 4986 *et seq.*). That statute imposes an excise tax on windfall profits realized from the production of domestic crude oil after February 29, 1980. The United States is subject to tax on windfall profits derived from oil removed from federally-owned lands (26 U.S.C. 4986(b), 4996(a)). During congressional consideration of the windfall profits legislation, senators from several oil-producing states (including New Mexico) attempted to prevent oil in which the United States owns an economic interest from being subjected to the tax, expressing concern that the amounts the states would receive under the Mineral Act would thereby be reduced. See 125 Cong. Rec. 36290, 36491 (1979); 126 Cong. Rec. 5839-5840, 6062-6063, 6193-6194, 6658 (1980). They were unsuccessful. Remarks made during the floor debate by Senator Long, the Chairman of the Senate Finance Committee, and other oil-state senators evidenced their understanding that the statute as enacted would subject the states' 50% share of federal oil royalties to diminution by the windfall profit tax. See 126 Cong. Rec. 2623-2624, 2825-2826, 3030-3031 (1980).

2. Reading the relevant provisions of the above-described statutes together in light of the latter's legislative history, the Secretary of the Treasury determined that the windfall profit tax should be applied against the federal government's gross royalties from federal oil-producing lands, *before* making the apportionment called for by the Mineral Act. As a result, the burden of the tax was borne ratably by the states' 50% share, the Reclamation Fund's 40% share, and the general revenue's 10% share of the royalties. Since the passage of the Windfall Profit Tax Act in 1980, the Secretary has consistently paid to the states oil royalty distributions that reflected their 50% share of the royalties diminished by a ratable share of the tax. Pet. App. 2a; R. 12-13.

On December 17, 1980, the Attorney General of New Mexico protested the Secretary's computation. He contended that the Mineral Act required the Treasury to remit to the states 50% of *gross* federal oil royalties, undiminished by any windfall profit tax, and that the entire burden of the tax should thus be borne by the United States (R. 14-15). The Secretary denied the protest. Under New Mexico's position, he pointed out, the imposition of the windfall profit tax on federal royalty income, contrary to Congress's intent, would raise no net revenue, since an increase in federal tax revenue would be precisely offset by a decline in federal royalty revenue. And the State's position, he noted, would make it impossible for him to apportion 40% of the royalties to the Reclamation Fund and 10% of the royalties to miscellaneous Treasury receipts, as the Mineral Act requires.

3. Following the denial of its protest, the State brought this action against the Secretary in the United States District Court for the District of New Mexico. The State framed its complaint to seek (1) a declaratory judgment that the Mineral Act entitles it to receive 50% of royalties from

federally-owned, oil-producing lands in New Mexico undiminished by any windfall profit tax; and (2) an order compelling the Secretary to pay over to the State the amount of windfall profit tax (plus interest) alleged to have been withheld illegally, and directing him to cease withholding such amounts in the future.

The district court characterized the action as one "seeking declaratory, mandamus and specific relief" and took jurisdiction under 28 U.S.C. 1331, 1361, 2201 and 5 U.S.C. 702 (Pet. App. 15a). The court seemed to recognize that, if the action were characterized as "a suit for money damages," exclusive jurisdiction would lie in the Claims Court (*id.* at 14a-15a). But the court reasoned that the suit requested not money damages but "specific relief" in the form of "the very monies which were used by the United States to pay the tax rather than distributed to the State" (*id.* at 14a). The fact that New Mexico claimed money held by the Treasury did not mean that "the requested relief [was] for money damages," in the district court's view, since "[d]amages are a sum of money used as substitutionary relief," whereas specific relief "is an attempt to give back to the plaintiff that which he actually lost, not a sum measured by the amount of the loss, but the loss itself" (*ibid.*). Turning to the merits, the district court accepted the State's interpretation of the relevant statutes and granted in all respects the relief it requested (*id.* at 15a-22a).

The court of appeals held that the district court lacked jurisdiction and ordered the case transferred to the Claims Court (Pet. App. 1a-10a). It reasoned that the lawsuit, while nominally against the Secretary of the Treasury, was in reality against the United States and hence could not be maintained in the district court absent the government's consent to such suit (*id.* at 4a). The court found a limited waiver of sovereign immunity in 5 U.S.C. 702, which provides that a suit for review of agency action "seeking relief

other tha[n] money damages * * * shall not be dismissed * * * on the ground that it is against the United States." After analyzing the legislative history of that Section, however, the court concluded that Congress did not waive sovereign immunity to district court suits which, "read with a practical eye, * * * involve a claim for money" in excess of $10,000, since a contrary view would "run counter to the Tucker Act's express scheme for monetary claims against the United States" (Pet. App. 6a-7a & n.3, citing 28 U.S.C. 1346, 1491 and H.R. Rep. 94-1656, 94th Cong., 2d Sess. 20-24 (1976)). The court was unpersuaded by the district court's "semantic discussion of the meaning of the word 'damages,' " and followed a long line of cases holding that "when the 'prime objective' or 'essential purpose' of the complaining party is to obtain money from the federal government (in an amount in excess of $10,000), the Claims Court's exclusive jurisdiction is triggered" (Pet. App. 6a, 7a (citing cases)). The court held that the primary thrust of the instant action was for monetary relief and that its equitable aspects were "merely incidental and subordinate to the basic suit for money" (Pet. App. 8a). The court further held (*id.* at 8a-9a) that 28 U.S.C. 1361, which confers mandamus powers upon the district courts, is inapplicable where (as here) the Claims Court can provide appropriate relief, and ordered the case transferred to that court "in the interest of justice" under 28 U.S.C. 1631 (Pet. App. 9a-10a).

ARGUMENT

The only issue presented here concerns the proper federal forum for this litigation. The court of appeals' decision — that the Tucker Act's specific grant of Claims Court jurisdiction prevails over the general grant of federal question jurisdiction in 28 U.S.C. 1331 — is correct. That decision does not conflict with any decision of this Court or of another court of appeals. This Court last Term denied

review of a case presenting a substantially identical question. *Portsmouth Redevelopment & Housing Authority* v. *Pierce*, 464 U.S. 960 (1983). There is no basis for further review here.

Petitioner does not seriously dispute that the Tucker Act would permit the Claims Court to exercise jurisdiction over this case. There can be little doubt that the three requirements for Tucker Act jurisdiction are met. The State seeks a money judgment in excess of $10,000. The State's claim is founded upon federal law. And the claim is "against the United States" because "the judgment sought would expend itself on the public treasury" and would "restrain the Government from acting, or * * * compel it to act." *Dugan* v. *Rank*, 372 U.S. 609, 620-621 (1963) (original quotation marks omitted). What petitioner contends is that the court of appeals erroneously found the Claims Court's jurisdiction to be *exclusive*, thereby rejecting the argument that jurisdiction in the district court could be predicated on 28 U.S.C. 1331 (federal question jurisdiction), 5 U.S.C. 702 (Administrative Procedure Act), or 28 U.S.C. 1361 (mandamus jurisdiction). As the court of appeals correctly pointed out, however, none of those provisions furnishes jurisdiction here.

Section 1331 grants the district courts "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." But the courts of appeals have repeatedly recognized that the more specific grant of jurisdiction to the Claims Court under 28 U.S.C. 1346(a)(2) and 1491(a)(1) in suits arising under federal law for amounts in excess of $10,000, where applicable, prevails over the general grant of jurisdiction to the district courts in Section 1331. *E.g.*, *Portsmouth Redevelopment & Housing Authority* v. *Pierce*, 706 F.2d 471, 473-475 (4th Cir.), cert. denied, 464 U.S. 960 (1983); *Keller* v. *MSPB*, 679 F.2d 220,

222 (11th Cir. 1982); *Graham* v. *Henegar*, 640 F.2d 732, 734-735 (5th Cir. 1981); *Lenoir* v. *Porters Creek Watershed District*, 586 F.2d 1081, 1087-1088 (6th Cir. 1978). Otherwise, the exclusive jurisdiction of the Claims Court would be largely destroyed because most cases falling within its jurisdiction could also be brought within Section 1331. See *Graham*, 640 F.2d at 734. Indeed, the distinction Congress drew in the Tucker Act between suits for amounts less than, or in excess of, $10,000 would on petitioner's theory be obliterated. Compare 28 U.S.C. 1346(a)(2) with 28 U.S.C. 1491(a)(1).

The courts are likewise in agreement that the exclusive jurisdiction of the Claims Court under 28 U.S.C. 1491(a)(1) cannot be avoided "by framing a complaint to appear to seek only injunctive, mandatory or declaratory relief against government officials when the result would be the equivalent of obtaining of money damages." *B.K. Instrument, Inc.* v. *United States*, 715 F.2d 713, 727 (2d Cir. 1983) (citing cases). Where a complaint seeks both monetary and equitable relief, and the primary objective or essential purpose of the lawsuit is to obtain money under a federal statute from the federal government in excess of $10,000, the Claims Court's jurisdiction is exclusive. *E.g.*, *B.K. Instrument, Inc.*, 715 F.2d at 727; *Portsmouth Redevelopment & Housing Authority*, 706 F.2d at 474; *Keller* v. *MSPB*, 679 F.2d at 222-223; *Hoopa Valley Tribe* v. *United States*, 596 F.2d 435, 436, 443 (Ct. Cl. 1979). The courts have recognized that a district court may retain jurisdiction over an equitable claim where the latter is "paramount." *E.g.*, *Minnesota* v. *Heckler*, 718 F.2d 852, 858-860 (8th Cir. 1983). But "[a] district court does not gain jurisdiction over a Tucker Act claim simply because the complaint couples requests for monetary relief with requests for injunctive relief." *Portsmouth Redevelopment & Housing Authority*, 706 F.2d at 474.

Under these principles, the court of appeals plainly reached the right result here. Petitioner seeks an amount of money equal to the windfall profit tax allocable to its share of Mineral Act royalties, interest on that sum, and a declaration that the Secretary pay those royalties in future free of that tax. As the court below properly concluded, New Mexico's suit is thus "essentially one designed to reach money which the government owns" and to "fix the government's * * * liability" to petitioner with respect to that money (Pet. App. 8a). Accord, *e.g.*, *Hoopa Valley Tribe*, 596 F.2d at 436, 443. Although petitioner's suit has ancillary equitable aspects, it will suffer no deprivation of rights by being routed to the Claims Court. That court is empowered to award declaratory relief that is "tied to and subordinate to a monetary award." *Austin* v. *United States*, 206 Ct. Cl. 719, 723, cert. denied, 423 U.S. 911 (1975). See *United States* v. *Mitchell*, No. 81-1748 (June 27, 1983), slip op. 10 n.15; *Portsmouth Redevelopment & Housing Authority*, 706 F.2d at 474.[1]

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[1]Petitioner errs in asserting (Pet. 7) that "the circuits are badly split" as to the circumstances under which a case should be bifurcated between the Claims Court and the district court, the former taking jurisdiction of the damages claim and the latter retaining jurisdiction of the injunctive and declaratory claims. Petitioner's reliance in this respect on *Minnesota* v. *Heckler*, *supra*, is misplaced. The State there sought declaratory and injunctive relief as to its rights to federal Medicaid funds; although the suit arose from the disallowance of federal funds for costs incurred in three facilities, the Eighth Circuit concluded that the primary object of the lawsuit involved the fundamental question of what was an "institution for mental diseases" under the relevant federal statute--a determination that would affect far more than those three facilities (718 F.2d at 859). The court thus held that jurisdiction of the equitable claims lay in the district court, the monetary claims being transferred to the Claims Court (*id.* at 857-860). Here, by contrast, New Mexico's suit goes no further than to fix the monetary liability of the government to it, and the Claims Court plainly has the power to grant sufficient "equitable relief collateral to a monetary award in order to resolve [the] entire controversy" (*id.* at 858). And while the Eighth Circuit in *Minnesota* v. *Heckler* suggested (718 F.2d at 858 n.11)

Petitioner's position is not improved by its reliance (Pet. 8-10) on 5 U.S.C. 702. Whereas Section 1331 contains no "general waiver of immunity" (*B.K. Instrument, Inc.*, 715 F.2d at 724), Section 702 does waive sovereign immunity in certain suits for judicial review of administrative action. But Section 702 confers no "implied grant of subject-matter jurisdiction to review agency actions" (*Califano* v. *Sanders*, 430 U.S. 99, 105 (1977)). Subject-matter jurisdiction in the district court would have to be predicated here on 28 U.S.C. 1331, and, as we have noted above, Section 1331 must yield to the Tucker Act in cases of this sort. Section 702, moreover, waives sovereign immunity only in actions "seeking relief other tha[n] money damages." Since, as the court below properly held, the instant action is primarily and essentially one for monetary relief, Section 702 has no application here. See, *e.g.*, *B.K. Instrument, Inc.*, 715 F.2d at 726-727.

Equally inapplicable as a source of district court jurisdiction is 28 U.S.C. 1361, which grants the district courts "original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States * * * to perform a duty owed to the plaintiff." To begin with, that Section is not an all-purpose waiver of sovereign immunity allowing raids on the United States Treasury. See *Murray* v. *United States*, 686 F.2d 1320, 1325-1326 (8th Cir. 1982), cert. denied, 459 U.S. 1147 (1983); *Estate of Watson* v. *Blumenthal*, 586 F.2d 925, 935 (2d Cir. 1978);

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that "[a] split of authority exists" between those courts (like itself) that use a "primary purpose" test and other courts (like the Eleventh Circuit in *Keller* v. *MSPB, supra*) that supposedly allow the monetary claim to dictate exclusive Claims Court jurisdiction regardless of which claim is primary, the *Keller* court in fact employed a primary purpose analysis (679 F.2d at 223). In any event, the alleged conflict is irrelevant here because under either test the Claims Court would have exclusive jurisdiction of the instant case in its entirety.

Smith v. *Grimm*, 534 F.2d 1346, 1352 n.9 (9th Cir.), cert. denied, 429 U.S. 980 (1976). And even if there were a waiver of sovereign immunity, mandamus jurisdiction is available only where the duty owed the complainant is ministerial and leaves nothing to the discretion of the official involved. *Louisiana* v. *McAdoo*, 234 U.S. 627, 633-634 (1914); *Kendall* v. *United States*, 37 U.S. (12 Pet.) 524, 610 (1838). "[W]here the duty * * * depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus." *Wilbur* v. *United States ex rel. Kadrie*, 281 U.S. 206, 219 (1930) (footnote omitted). That is plainly the situation here.

Finally, it is well settled that mandamus is not available where there exists an adequate remedy at law. *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 35 (1980); *United States ex rel. Girard Trust Co.* v. *Helvering*, 301 U.S. 540, 544 (1937); *Minnesota* v. *Heckler*, 718 F.2d at 859 n.12; *Burgos* v. *Milton*, 709 F.2d 1, 3 (1st Cir. 1983); *Carter* v. *Seamans*, 411 F.2d 767, 773 (5th Cir. 1969), cert. denied, 397 U.S. 941 (1970). New Mexico plainly has an adequate remedy in the Claims Court: that court has the power to fix the government's liability to the State on its monetary claim, and also, if monetary relief is granted, to grant declaratory relief tied to such claim. *United States* v. *Mitchell*, slip op. 10 n.15; *Portsmouth Redevelopment & Housing Authority*, 706 F.2d at 474.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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